



June 13, 2003

Mary L. Cottrell, Secretary
Department of Telecommunications and Energy
One South Station
Boston, MA 02110

Re: D.T.E. 03-56

Dear Secretary Cottrell:

On behalf of Massachusetts Electric Company, we are enclosing for filing the following documents:

1. Answer of Massachusetts Electric Company;
2. Massachusetts Electric Company's Motion to Dismiss;
3. Massachusetts Electric Company's Memorandum of Law in Support of its Motion to Dismiss;
4. Massachusetts Electric Company's Motion to Stay the Proceedings Pending Resolution of the Motions to Dismiss;
5. Attachments; and
6. Certificate of Service.

Thank you very much for your time and attention to this matter.

Very truly yours,

Amy G. Rabinowitz
Judy Y. Lee
Attorneys for Massachusetts
Electric Company

cc: Jesse Reyes, DTE
Bruce P. Beausejour, Verizon New England
Alexander W. Moore, Verizon New England
Keefe B. Clemons, Verizon New England
Stephen Gibelli, Northeast Utilities Service Company
Stephen Klionsky, Northeast Utilities Service Company

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FIBER TECHNOLOGIES NETWORKS, LLC,)	
f/k/a FIBER SYSTEMS, LLC,)	
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v.)	
)	
VERIZON MA NEW ENGLAND, f/k/a)	
NEW ENGLAND TELEPHONE AND)	D.T.E. 03-56
TELEGRAPH COMPANY,)	
)	
And)	
)	
NORTHEAST UTILITIES SERVICE COMPANY,)	
d/b/a WESTERN MASSACHUSETTS)	
ELECTRIC COMPANY,)	
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And)	
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MASSACHUSETTS ELECTRIC COMPANY.)	
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Pursuant to 220 CMR 45.05, Massachusetts Electric Company (“Mass. Electric”) files this Answer to the Amended Complaint and Petition for Declaratory Relief (the “Amended Complaint”) filed with the Department of Telecommunications and Energy (“Department”) by Fiber Technologies Networks, L.L.C. (“Fibertech”) on May 14, 2003. As discussed below, the Department should deny Fibertech’s prayers for relief and dismiss its Amended Complaint.

I. INTRODUCTION

The Amended Complaint represents Fibertech's latest attempt to rationalize and justify *ex post facto* its unlawful actions in installing unauthorized and unlicensed attachments on poles owned by Mass. Electric, Verizon New England, f/k/a New England Telephone and Telegraph Company, d/b/a Verizon Massachusetts ("Verizon MA"), and Northeast Utilities Service Company d/b/a Western Massachusetts Electric Company ("WMECO") in Western Massachusetts. Fibertech installed these attachments in express violation of various aerial license agreements separately entered into by and between Fibertech and the aforementioned utilities.

On or about March 17, 2000, Mass. Electric entered into an Aerial License Agreement ("Agreement") with Fibertech, which would allow Mass. Electric to license attachments by Fibertech to poles owned solely or jointly in Worcester. Attachment E, ¶ 3. This Agreement was amended on July 22, 2000, December 13, 2000, and July 3, 2001 to add other municipalities. Attachment E, ¶¶ 4-6. The parties added Northampton pursuant to both the July 22, 2000 and December 13, 2000 amendments. Attachment E, ¶ 5, Attachment J. Between July 2000 and February 2002, Fibertech sent Mass. Electric applications seeking to make attachments to hundreds of poles in Mass. Electric's western Massachusetts service area, including Northampton. Attachment D, ¶ 7. In connection therewith, Mass. Electric worked closely with Fibertech, advising Fibertech of the necessary steps for securing these attachments, and providing them with written policies and procedures for attaching. Attachment D, ¶ 7.

From the beginning, Fibertech appeared reluctant to comply with licensing requirements. Attachment D, ¶ 8. Fibertech often disputed and questioned vertical

clearance standards set forth by the National Electric Safety Code (“NESC”), which Mass. Electric follows. Attachment D, ¶ 8.

On or around the weekend of June 21, 2002 through June 23, 2002, Fibertech attached fiber cables to poles solely and jointly owned by Mass. Electric, without authorization. Attachment D, ¶ 9. Fibertech never even submitted applications for many of these attachments. Attachment D, ¶ 10. A complete summary of Fibertech’s applications, locations and number of poles involved, status of make-ready work, and confirmed unauthorized Fibertech attachments is provided in Attachment D, ¶ 11. Fibertech made these attachments in complete disregard of the requirements in the Agreement. Attachment D, ¶ 12, Attachment E, ¶ 7. The attachments ignored applicable standards of construction, maintenance, and safety. Attachment D, ¶ 12. Fibertech even attached to a number of old condemned poles that Mass. Electric intended to replace because they had deteriorated. Attachment D, ¶¶ 17-18. Fibertech’s haphazard installation of its attachments created countless construction, maintenance, and safety issues, and has also made it extremely difficult for Mass. Electric to complete the make-ready work that would be required to accommodate Fibertech’s attachments. Attachment D, ¶ 21.

Mass. Electric notified Fibertech on July 15, 2002 that it had made these unauthorized attachments, and Fibertech responded on July 22, 2002, denying that it lacked authorization. Attachment E, ¶¶ 7-8. In a follow-up letter dated July 25, 2002, Fibertech admitted that it did not have authorization, and claimed that it would now pursue such authorization. Attachment E, ¶ 11. Fibertech failed to do so, however, and Mass. Electric gave Fibertech notice of termination by letter dated September 18, 2002. Attachment E, ¶ 12.

Fibertech made these attachments not only without Mass. Electric's consent, but also without the consent of Northampton. Attachment D, ¶ 22, Attachment E ¶ 11.

In August 2002, Verizon MA and WMECO filed suit against Fibertech in the Superior Court of Hampden County for failing to obtain required licenses prior to installing attachments on their poles and making many of the attachments in an unsafe manner that jeopardized the safety of their employees, the employees of other companies who attach to the poles, and the general public. In apparent retaliation to the suits filed against it, on August 13th, 2002, Fibertech filed a Petition for Interim Relief and Complaint ("Petition") against Verizon MA and WMECO. The Department docketed this matter as D.T.E. 02-47. Following a hearing on August 14th, the Superior Court justice entered an order granting Verizon MA and WMECO a preliminary injunction that prohibited Fibertech from making any further attachments without the express written authorization of the pole owner(s), the Superior Court, or the Department, and required Fibertech to remove within 45 days all attachments on poles for which it did not have a license or alternatively, tender \$400,000 to Verizon MA and WMECO to be used by Verizon MA and WMECO to correct unsafe conditions caused by Fibertech's attachments on Verizon MA and WMECO's poles. Fibertech's Petition was dismissed without prejudice by the Department on December 24, 2002. Fibertech requested reconsideration of the Department's dismissal, for which the Department has yet to rule. Thus, the D.T.E. 02-47 proceeding remains pending.

Mass. Electric also filed suit against Fibertech in the Superior Court of Hampden County on September 18th, 2002, requesting injunctive relief and damages for breach of the Agreement. Copies of documents filed in that proceeding are provided in the accompanying Appendix, and are incorporated herein by reference: Attachment A, Complaint of Mass.

Electric; Attachment B, Application for Preliminary Injunction; Attachment C, Memorandum of Law in Support of Application for Preliminary Injunction; Attachment D, Affidavit of Pamela Jo Fournier; Attachment E, Affidavit of G. Paul Anundson; and Attachment F, Emergency Motion to Consolidate with the Verizon MA and WMECO proceeding. On September 23rd, 2002, Fibertech filed its motion at the Department to add Mass. Electric to its Petition. Because the Department dismissed Fibertech's Petition against Verizon MA and WMECO, it mooted Fibertech's motion to add Mass. Electric to the Petition. In addition, the Hampden Superior Court denied Fibertech's Motions to Dismiss the complaints of Mass. Electric, Verizon MA, and WMECO on November 14, 2002; May 23, 2003; and May 23, 2003, respectively.

Fibertech agreed to enter into a consent order with Mass. Electric that closely mirrors the terms of the Superior Court order granting the preliminary injunction in favor of Verizon MA and WMECO. In the consent order, dated September 30, 2002, Fibertech agreed not to make any further attachments to Mass. Electric's poles without the express written authorization of the pole owner(s), the Superior Court, or the Department; to pay Mass. Electric \$59,000 for corrections of all unsafe conditions caused by Fibertech's attachments on Mass. Electric's solely owned poles;¹ and to transfer other attachments as required by Mass. Electric. A copy of the consent order is attached as Attachment G.

On May 14, 2003, Fibertech filed its Amended Complaint, despite the fact that Department has yet to rule on Fibertech's request for reconsideration in D.T.E. 02-47.

¹ Most of the poles on which Fibertech installed its unauthorized attachments were jointly owned with Verizon MA, and Mass. Electric was to be reimbursed for the make-ready costs on these jointly-owned poles out of Fibertech's payment to Verizon MA stemming from the Superior Court order granting the preliminary injunction, but as described in the response to paragraph 16 below, Verizon has spent the entire amount of the payment tendered to it by Fibertech to correct violations caused by Fibertech's unauthorized attachments on Verizon MA's poles. Fibertech still has an outstanding obligation to Mass. Electric in the amount of \$14,657 for the make-ready costs described above.

The Amended Complaint is a thinly disguised attempt to rehash the same false allegations and gross misrepresentations that Fibertech made in the Petition, and once again, Fibertech fails to provide any factual support for the accusations it makes in the Amended Complaint.

II. MASS. ELECTRIC'S ANSWERS TO THE NUMBERED PARAGRAPHS OF THE COMPLAINT

As to the specific claims set forth in Fibertech's Amended Complaint, Mass. Electric responds to the numbered paragraphs of the Amended Complaint as follows:

1. Mass. Electric admits that it owns poles. The remainder of this paragraph of the Amended Complaint set forth legal conclusions that do not require responses.
2. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. Mass. Electric denies that it has engaged in any efforts or anti-competitive conduct, collusively or otherwise, to obstruct or delay any lawful attempt on the part of Fibertech to build and install a carrier-ready dark fiber optic network in and around Springfield, Massachusetts. Mass. Electric further denies that the terms and conditions of its Agreement are unjust or unreasonable. Moreover, despite the fact that Mass. Electric and Fibertech (f/k/a Fiber Systems LLC) entered into the Agreement on March 17, 2000, Fibertech had not filed a complaint with the Department regarding Mass. Electric's licensing procedures prior to Fibertech's Motion for Leave to Amend Petition for Interim Relief and Complaint filed on September 23, 2002. It is telling that Fibertech delayed two and a half years before initiating its complaint before the Department. It is even more telling that, in exact parallel to Fibertech's initiation of its complaint with the Department against Verizon MA and WMECO following the filing of

their suit against Fibertech in the Hampden Superior Court, Fibertech's actions to add Mass. Electric to its Petition came on the heels of Mass. Electric's suit against Fibertech, filed in the Superior Court of Hampden County on September 18, 2002.

Mass. Electric has established a licensing process for installing attachments to poles owned exclusively by Mass. Electric or owned jointly by Mass. Electric and Verizon MA, which includes the execution of an Agreement by Mass. Electric and the attaching party. This licensing process is designed to ensure: (a) the integrity of Mass. Electric's distribution service facilities and the equipment of other parties attached to Mass. Electric's poles and (b) the safety of Mass. Electric's employees, joint pole owners, third party users, and the general public. Any delays experienced by Fibertech were of its own making, and caused by Fibertech's constant filing of new applications, cancellation of pending applications, changing the scope of the project, and refusal to comply with the licensing process. *See* Attachment D, ¶ 8 and Timeline of Events.

3. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. Mass. Electric denies that its responses to Fibertech's initial pole applications were provided "between 185 and 542 days after submission of the applications." Mass. Electric disputes the time frames given by Fibertech. Mass. Electric responded to all of Fibertech's pole applications in a timely and expeditious manner. To the contrary, it was Fibertech's haphazard manner in and ineptness at filing the pole applications, delay in responding to inquiries from Mass. Electric regarding the pole applications, and refusal to comply with Mass. Electric's processes and requirements for pole attachment licenses that caused the delays. *See* response to paragraph 2 above.

4. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. Mass. Electric denies that it assessed to Fibertech unreasonable, illegitimate, and discriminatory make-ready charges. All make-ready charges assessed to Fibertech were in accordance with the terms of the Agreement and all make-ready work identified pursuant to the Agreement was necessary before Fibertech could safely install its attachments on Mass. Electric's poles. Mass. Electric did not require Fibertech to pay for replacement poles on which Fibertech's attachments would be installed when another less expensive means to accommodate Fibertech's attachments was available that would still comply with applicable codes and regulations, nor did Mass. Electric require Fibertech to pay for the correction of pre-existing conditions on the poles. In performing any work on its poles, Mass. Electric's standard practice is to hold itself to the highest applicable standard or requirement among the NESC, Manual of Construction Procedures, Electric Company Standards, and the National Electric Code (NEC), and Mass. Electric holds attaching parties to no higher a standard or more stringent a requirement than Mass. Electric does itself.

5. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. Fibertech does not indicate with any specificity the applications to which it is referring in this paragraph. Moreover, to the extent that Fibertech is asserting that Mass. Electric is required to issue licenses for individual poles that do not require make-ready work, even if such poles comprise a part of a larger set of poles requiring make-ready work covered by the same application, Mass. Electric denies this allegation. Such a system of pole licensing administration would be contrary to the terms and conditions of the Agreement, unduly burdensome for Mass. Electric, and would be of no

practical use to Fibertech, since Fibertech needs to mount attachments to all of the poles covered by its applications, not just a handful of them, in order to build and install its networks.

6. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. Mass. Electric denies that it made and assessed to Fibertech unlawful make-ready demands and charges. *See* response to paragraph 4 above. Mass. Electric does not have information sufficient to address the claims of Fibertech regarding the make-ready costs assessed to Fibertech in Connecticut and more importantly, such information is irrelevant to these proceedings in Massachusetts.

7. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. Mass. Electric denies that it delayed responding to Fibertech's pole applications. *See* response to paragraph 3 above. Mass. Electric does not have information sufficient to address the claims of Fibertech regarding its business plans, finances, or revenue projections, nor the reasons for Fibertech's patterns of erratic behavior consisting of the filing of new applications, cancellation of pending applications, changing the scope of the project, and refusal to comply with the licensing process. *See* Attachment D, ¶ 8 and Timeline of Events. Mass. Electric further notes that Fibertech never availed itself of the dispute resolution provisions expressly contained in the Agreement, nor did Fibertech ever go before the Department or a court to air its grievances.

8. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. Mass. Electric denies that any of its actions (or lack thereof) forced Fibertech to downsize its network. Mass. Electric denies that it employs "exclusionary

practices in Massachusetts.” Mass. Electric does not have information sufficient to address the remainder of Fibertech’s claims in this paragraph.

9. Mass. Electric denies that its pole attachment licensing practices obstructed Fibertech’s efforts to build a competitive network in the Springfield area. Mass. Electric will not address the remainder of this paragraph of the Amended Complaint because it is addressed to Verizon MA.

10. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. Mass. Electric does not have information sufficient to address the claims of Fibertech regarding the survey and make-ready work amounts paid by Fibertech to other utilities, nor the amounts paid by Fibertech in the aggregate. Mass. Electric agrees that Fibertech was not expressly authorized to place its attachments on any of Mass. Electric’s poles, and Mass. Electric did not issue any pole attachment licenses to Fibertech because the required make-ready work had not been completed. Pursuant to the Agreement, the required make-ready work by Mass. Electric had not been performed because Fibertech had neither authorized nor paid to Mass. Electric the estimated cost of such make-ready work. Mass. Electric denies that it withheld pole attachment licenses or assessed Fibertech any additional make-ready work charges over and above that which was required to prepare the poles on which Fibertech wished to install its attachments. If Fibertech had concerns about the make-ready charges, it could have taken advantage of the dispute resolution provisions in the Agreement or contacted Mass. Electric with its concerns as it had done in the past in other areas with Mass. Electric and its affiliates, but Fibertech failed to do so and instead took the unwarranted and unprecedented step of engaging in “self-help.”

11. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. Mass. Electric denies that it caused delays to or imposed unreasonable terms and conditions on Fibertech. Mass. Electric does not have information sufficient to address the claims of Fibertech regarding its agreements with an alleged customer and the loss of its funding. Fibertech, by its own admission, states that it installed attachments on Mass. Electric's poles prior to resolution by the Department or the parties of outstanding issues regarding make-ready work and cost-allocation. Mass. Electric denies that Fibertech had any justification, lawful or otherwise, to engage in "self-help" by installing its attachments on Mass. Electric poles without Mass. Electric's consent or knowledge and notes that the Hampden Superior Court, in Verizon MA and WMECO's case against Fibertech, also found that Fibertech had no justification for engaging in "self-help." Mass. Electric does not have information sufficient to address the claims of Fibertech regarding the dates that Fibertech installed attachments on Mass. Electric's poles because Fibertech never notified Mass. Electric that it was taking such action. Mass. Electric only discovered the attachments when an employee noticed them on June 24, 2002.

Mass. Electric further denies that Fibertech installed its authorized attachments "in a safe manner consistent with industry practice." Instead, Fibertech's attachments presented an example of a "complete disregard of licensing agreement requirements. FiberTech's cable attachment methods ignore[d] applicable standards of construction, maintenance, and safety." *See* Attachment D, ¶ 12. Most noteworthy of Fibertech's violations was Fibertech's failure to meet minimum vertical clearance requirements between communications space cables and low voltage electric secondary

cables in the supply space, as mandated by the NESC. The NESC specifically requires forty inches of vertical clearance between communications space cables and electric supply space cables. Maintaining this vertical clearance requirement is necessary to minimize the risk of energizing communications cables and to prevent the creation of life-threatening hazards to communications and electric workers working on and around the poles. *Id.* Contrary to what Fibertech claims in this paragraph, NESC does not allow any exceptions from the vertical clearance requirement through the use of extension arms. Fibertech made a mockery of NESC requirements by using extension arms to circumvent the clearance requirement. Mass. Electric does not have information sufficient to address the claims of Fibertech regarding the New York State Department of Public Service or Verizon MA managers allowing the use of lag-bolted extension arms to attach facilities, but this information is irrelevant to these proceedings in Massachusetts. Mass. Electric requires that all hardware, including extension arms, be installed in accordance with the manufacturer's recommendations and strength ratings. Mass. Electric is unaware of any manufacturer, making the type of extension arm used by Fibertech, which has tested or supplies strength ratings for its extension arms when the extensions arms are installed using lag bolts.

Finally, in this paragraph and many others, Fibertech complains of the delays caused by the utilities in processing its pole license applications, but offers no reasons why it failed to present its complaints to the Department or before a court before engaging in "self-help."

12. Mass. Electric will not address most of this paragraph of the Amended Complaint because it is addressed to Verizon MA and WMECO, except for the last

sentence. Mass. Electric vehemently denies the allegations contained in the last sentence of this paragraph of the Amended Complaint as a fraudulent misstatement and misrepresentation of the facts. Mass. Electric did not withdraw its complaint and motion for preliminary injunction; Mass. Electric and Fibertech entered into a consent order, substantially similar to the terms of the preliminary injunction that the Superior Court imposed on Fibertech in the suit filed against it by Verizon MA and WMECO, pursuant to which Fibertech agreed to pay Mass. Electric \$59,000 to correct the conditions caused by Fibertech's unauthorized attachments. *See* Attachment G.

13. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to Verizon MA and WMECO.

14. Mass. Electric does not have information sufficient to address the claims of Fibertech regarding the alleged survey conducted on behalf of Fibertech, but the information is irrelevant to the question of Fibertech's unauthorized attachments. Mass. Electric denies that nearly half of its poles in the Springfield area present safety hazards of the nature and magnitude created by Fibertech when Fibertech installed its unauthorized attachments. Mass. Electric denies the remaining allegations in this paragraph.

15. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint.

16. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to Verizon MA and WMECO, except for the last sentence. The amounts in this paragraph pertain to poles owned exclusively by Mass. Electric. Mass. Electric also spent \$14,657 on make-ready work performed on jointly-owned poles.

Mass. Electric was to be reimbursed for this amount from the \$400,000 Fibertech tendered to Verizon MA pursuant to the order issued in the preliminary injunction against Fibertech, but Verizon MA has already spent all of those monies correcting the violations caused by Fibertech's unauthorized attachments on Verizon MA's poles. Fibertech still has an outstanding obligation to Mass. Electric in the amount of \$14,657.

17. Because Fibertech has failed to comply with the Agreement and refused to correct the violations identified by Mass. Electric, Mass. Electric has sent to Fibertech a Notice of Termination of Agreement letter. *See* Attachment E, ¶ 12. However, unlike Fibertech's reliance on self-help measures, Mass. Electric has taken the additional step of requesting that the Hampden Superior Court issue a declaratory judgment reiterating Mass. Electric's right to terminate the Agreement, even though Mass. Electric is fully within its rights to do so by the express provisions of the Agreement. *See* Attachment A.

18. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to Verizon MA, except for the first and last sentence. Mass. Electric denies the allegations in the first sentence as they relate to Mass. Electric. Mass. Electric agrees that the last sentence of this paragraph is true, but notes that the statement applies to Fibertech and that Fibertech, by its actions, has undermined the principles stated in this sentence and has committed the most egregious violations of such principles.

19. Mass. Electric does not have information sufficient to address the claims of Fibertech contained in this paragraph, including its corporate structure, its business plans, or the services it provides or plans to provide.

20. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to Verizon MA.

21. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to WMECO.

22. Mass. Electric admits that it is an electric utility company with a principal place of business at 55 Bearfoot Road, Northborough, Massachusetts, but denies that it provides electricity to all or part of the Springfield, Massachusetts metropolitan area. Mass. Electric admits that Northampton is part of its service territory.

23. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to WMECO.

24. Mass. Electric admits that it is affiliated with NEESCom. Mass. Electric does not have information sufficient to determine whether Fibertech and NEESCom are competitors.

25. Mass. Electric believes this statement to be true and correct.

26. Mass. Electric believes this statement to be true and correct.

27. This paragraph of the Amended Complaint sets forth a legal conclusion that does not require a response.

28. Mass. Electric admits that Fibertech has filed applications with Mass. Electric for the installation of Fibertech's attachments to Mass. Electric's poles, not conduits, in Northampton.

29. This paragraph of the Amended Complaint sets forth a legal conclusion that does not require a response.

30. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to Verizon MA.

31. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to Verizon MA and WMECO.

32. Mass. Electric admits that it entered into the Agreement with Fibertech on March 17, 2000, and that Fibertech's Exhibit E represents a true and accurate copy of that Agreement. Mass. Electric notes that the scope of the original Agreement did not allow for the installation of attachments to poles in Northampton. The Agreement was amended on July 22, 2000 to include Northampton and a number of other municipalities to the scope of the agreement. A true and accurate copy of this amendment is attached as Attachment J. Mass. Electric admits that Fibertech first began requesting the installation of attachments to Mass. Electric's poles pursuant to the Agreement in 2000.

33. The Department regulations cited in this paragraph of the Amended Complaint speak for themselves and no further response is necessary. Mass. Electric will not address the remainder of this paragraph of the Amended Complaint because it is addressed to Verizon MA.

34. Mass. Electric will not address the portions of this paragraph of the Amended Complaint relating to Verizon MA and WMECO. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint relating to Mass. Electric. *See* response to paragraph 3 above. Mass. Electric is without knowledge as to reasons why Fibertech continually filed new applications and cancelled its existing applications. Mass. Electric does not have information sufficient to address the claims of Fibertech regarding the amounts paid to all utilities in the aggregate for pole surveys.

35. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. Mass. Electric denies that that Fibertech's Exhibit F is a complete list of the poles on which Fibertech installed its attachments and further denies that Fibertech's Exhibit G is a complete set of the applications submitted by Fibertech and the utilities' responses to said applications. Mass. Electric disputes the time frames given by Fibertech. Mass. Electric responded to all of Fibertech's pole applications in a timely and expeditious manner. *See* response to paragraph 3 above.

36. Mass. Electric denies that the make-ready work charges assessed to Fibertech were not legal. *See* responses to paragraphs 4 and 5 above. If Fibertech took issue with the make-ready work charges, it should have filed a complaint with the Department at the time the estimates were given, not now after Fibertech has installed its unauthorized attachments and has been exposed.

37. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to Verizon MA.

38. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to Verizon MA.

39. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. *See* response to paragraph 4 above.

40. Mass. Electric states that the performance of make-ready work on a pole is not necessary if, without the performance of such make-ready work, the proposed attachment can be installed on the pole in conformance with the codes and standards referenced in the Agreement. Mass. Electric denies holding Fibertech to a higher

standard or more stringent a requirement than provided for in the Agreement, and Mass. Electric applies such standards and requirements consistently to all attaching parties.

41. Mass. Electric denies that it boxes poles “frequently.” Mass. Electric’s construction standards prohibit boxing in most situations, but will allow attaching parties to box poles that are already boxed, or in extraordinary circumstances and upon prior application to Mass. Electric, to box poles that Mass. Electric itself would box. Mass. Electric prohibits boxing because the practice makes poles much more expensive to replace, and given the increased use of poles by several different parties, Mass. Electric only allows boxing in the limited circumstances described above. Fibertech’s insistence on boxing poles for its own purposes and benefit puts its interests above those of future attaching parties (who would be forced to pay the higher costs to replace the poles boxed by Fibertech) so that Fibertech can enjoy the fruits of its ill-gotten gains in the present.

42. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to Verizon MA.

43. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. *See* response to paragraph 4 above.

44. Mass. Electric admits that it generally exercises practicality, common sense, and efficiency in its applications of applicable codes, regulations, and standards. Mass. Electric denies the implication in this paragraph that Mass. Electric tolerates wholesale noncompliance with applicable codes, regulations, and standards. Mass. Electric meets all applicable codes, regulations, and standards. Mass. Electric uses its discretion for the application of its internal standards and industry practices. Fibertech misstates the code requirement of forty inches of vertical clearance between an electrical

line and a communications cable, which is not a recommendation but a requirement, and conflates it with example of the industry standard practice of attaching communications lines twelve inches away from each other. The former is a construction code that Mass. Electric requires all applicants to follow, the latter is an industry accepted best practice. Mass. Electric does not have the time, resources, or responsibility to perform post-installation inspections of every attaching party placing attachments on Mass. Electric's poles.

45. Mass. Electric denies the defamatory allegations contained in this paragraph of the Amended Complaint. Moreover, Fibertech has enjoyed as much, if not more, flexibility in Mass. Electric's enforcement of its pole licensing application process and construction standards as compared with other attaching parties. *See* response to paragraph 50 below. Mass. Electric continued to work patiently with Fibertech, even in the face of Fibertech's haphazard manner in and ineptness at filing its pole applications, delay in responding to inquiries from Mass. Electric regarding the pole applications, and refusal to comply with Mass. Electric's processes and requirements for pole attachment licenses. It is Fibertech's installation of its unauthorized attachments that poses the greatest threat to the physical safety of Mass. Electric's employees, the employees of other companies who attach to the poles, and the general public. Fibertech installed its attachments without the consent of the utilities or the authority of the local municipality. Fibertech went in under the cover of darkness to install its attachments on Mass. Electric's poles as quickly as possible, using slapdash construction techniques without regard to the applicable codes, standards, and regulations. As a result of Fibertech's actions, a substantial danger of electrified communications lines and threats to the

physical safety of Mass. Electric's employees, joint pole owners, third party users, and the general public were created. Contrary to Fibertech's allegations, Mass. Electric applies codes, regulations, its internal construction standards, and industry practices consistently to all attaching parties.

46. Mass. Electric denies the first sentence of this paragraph of the Amended Complaint. Mass. Electric generally agrees with the remainder of this paragraph of the Amended Complaint, but notes that there are exceptions when the situation is not as simple as the example presented by Fibertech.

47. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint.

48. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint.

49. Mass. Electric denies the allegation contained in this paragraph of the Amended Complaint that Mass. Electric demanded that Fibertech pay for unnecessary pole replacements.

50. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. All pole replacements required by Mass. Electric were necessary to comply with the applicable codes, standards, and regulations. In many of the cases, Fibertech claims that no make-ready work would be required if the electric secondary were moved up according to the space allocation agreement between Verizon MA and Mass. Electric. Our agreement with Verizon MA allocates space on the pole between Mass. Electric and Verizon MA (the pole owners and the parties to the joint ownership agreement) and does not allocate space on the pole between a supply space and

communications space. The terms “supply space” and “communications space” are terms used by the NESC to define the types of facilities, required worker qualifications, and work practices required in each space, regardless of the owner of those facilities. The NESC defines the separation required (the “Communications Worker Safety Zone”) between those spaces, but does not attempt to define their size or to allocate space on a pole between different uses or users. The agreement with Verizon MA also specifically states that the space allocation “may be adjusted by mutual agreement between the pole owners to avoid a pole change out if field and code conditions permit.” This flexibility to avoid pole change outs is frequently used. Indeed, this flexibility to avoid pole change outs has been used to Fibertech’s benefit where Mass. Electric has raised its secondary wires and given up some of the space allocated to Mass. Electric in the joint ownership agreement between Mass. Electric and Verizon MA to allow Fibertech to attach without a pole change out. On the other hand, when this flexibility has already been used and the pole can no longer be rearranged to accommodate the next attachment, the pole must be replaced.

51. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to Verizon MA.

52. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. *See* response to paragraph 4 above.

53. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. In the example presented by Fibertech, the communications lines would have to be moved to accommodate Fibertech’s attachments whether or not the lines had been installed originally with the proper 40 inch vertical clearance between the

electrical line and the communications lines. The existence of the pre-existing violation in this example does not increase the make-ready charges assessed to Fibertech, since, as Fibertech points out in its footnote that the fee to move a line 16 inches versus 4 inches is the same, nor does the pre-existing violation negate the fact that Fibertech must pay the make-ready charges to move the lines to accommodate its attachments.

54. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. *See* response to paragraph 4 above.

55. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. However, as described in the response to paragraph 50 above, Mass. Electric has entered into pole space allocation agreements with Verizon MA, but Mass. Electric denies that Fibertech's Exhibit I is part of Mass. Electric's agreement with Verizon MA, and Mass. Electric does not have information sufficient to determine the origins of Exhibit I, its authorship, or what it is supposed to represent.

56. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to WMECO.

57. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. Mass. Electric denies that Fibertech's Exhibit K is an accurate listing of the poles for which the utilities required Fibertech to pay for make-ready work. Furthermore, as described in the example in the response to paragraph 53, Mass. Electric may have assessed Fibertech make-ready work charges for poles with pre-existing violations, but such make-ready work charges were only assessed in situations where make-ready work would still have been required to accommodate Fibertech's attachments even in the absence of a pre-existing violation.

58. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. As explained in paragraphs 53 and 57, an attaching party is required to pay for make-ready work, including pole replacement, if the correction of the pre-existing violation alone would not prepare the pole for the new attachment. Fibertech is responsible for paying the make-ready charges for the poles listed in Fibertech's Exhibit L.

59. See response to paragraph 7 above.

60. See response to paragraph 8 above.

61. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to Verizon MA.

62. See response to paragraph 10 above.

63. Mass. Electric agrees with Fibertech's admission that it engaged in "self-help" without any rationalization that has any basis in reality and incorrectly interpreted the Department's regulations. Mass. Electric does not have information sufficient to determine when and to how many poles Fibertech installed its unauthorized attachments. See response to paragraph 11 above.

64. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. Fibertech's attachments were not installed in a manner that would "exceed the quality of standard industry practice." See response to paragraph 11 above. Finally, Mass. Electric denies that Fibertech was confronted by a "hard practical choice of succumbing to [the utilities'] unlawful make-ready demands or the [utilities'] failing to install facilities for a prolonged and possibly fatal period of time." Fibertech has cited 220 CMR 45.00 *et seq.* several times in its Amended Complaint, and is fully aware that it

could have gone before the Department to air its grievances before violating the regulations to suit its own purposes and engaging in “self-help.”

65. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to Verizon MA.

66. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to Verizon MA.

67. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to Verizon MA.

68. Mass. Electric denies the allegations contained in this paragraph of the Amended Complaint. Mass. Electric denies that Fibertech’s installation of its attachments was “fully consistent with industry standards as practiced by the utilities in the installation of their own facilities and in the directions they give to other licensees as to where to attach their facilities.” *See* response to paragraph 11 above.

69. Mass. Electric will not address this paragraph of the Amended Complaint because it is addressed to WMECO.

70. Mass. Electric admits that this paragraph of the Amended Complaint is factually true, except that Mass. Electric did not file suit against Fibertech in Hampden Superior Court at the same time the order on the motion for a preliminary injunction was issued in Verizon MA and WMECO’s case against Fibertech.

71. *See* response to paragraph 14 above.

72. Mass. Electric does not have information sufficient to address the claims of Fibertech regarding the alleged survey conducted on behalf of Fibertech, but the information is irrelevant to the question of Fibertech’s unauthorized attachments.

FIRST AFFIRMATIVE DEFENSE

The Complaint fails to state a cause of action upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

Mass. Electric and Fibertech have entered into an Agreement pursuant to which both parties agreed to the rates, terms, and conditions of the contract. The rates, terms, and conditions in the contract are valid, enforceable, and binding on both parties. Although the Department has the authority under M.G.L. c. 166, § 25A to regulate the rates, terms, and conditions of a pole attachment agreement in which the parties cannot agree, the Department does not have the authority to abrogate a contract, such as the Agreement, which has been entered into in good faith by both parties.

THIRD AFFIRMATIVE DEFENSE

Fibertech is estopped from obtaining any relief on the Amended Complaint, in that Fibertech willingly entered into the Agreement with Mass. Electric.

FOURTH AFFIRMATIVE DEFENSE

Fibertech is barred from obtaining any relief on the Amended Complaint pursuant to the doctrine of unclean hands, in that Fibertech installed attachments on the poles at issue here in bad faith, without right, without permission of the pole owners, in breach of the Agreement, in trespass and in violation of M.G.L. c. 166, §35. Fibertech is not without fault with respect to the allegations in this Amended Complaint, and is therefore not entitled to any relief.

FIFTH AFFIRMATIVE DEFENSE

Fibertech, by its conduct, has waived any right to relief on the Amended Complaint.

SIXTH AFFIRMATIVE DEFENSE

The Department does not have authority to direct Mass. Electric to issue written licenses nor direct Mass. Electric to recognize the licensure of Fibertech's facilities on the poles in question.

SEVENTH AFFIRMATIVE DEFENSE

The Department should decline to grant any relief on the Amended Complaint in the interests of enforcing the sound public policies of: (1) requiring parties to obtain a pole attachment license before installing attachments on poles owned by others; and (2) requiring parties who dispute any rate, term, or condition of pole attachment agreements to bring such dispute to the Department or a court of competent jurisdiction rather than engaging in self help.

EIGHTH AFFIRMATIVE DEFENSE

The Amended Complaint fails to plead its claims with sufficient particularity as required by the Department's regulations at 220 CMR §45.00 *et seq.*

NINTH AFFIRMATIVE DEFENSE

The Amended Complaint seeks generalized relief that is not appropriate and cannot be granted in this pole attachment proceeding.

TENTH AFFIRMATIVE DEFENSE

Fibertech lacks standing to bring the claims alleged in the Amended Complaint.

ELEVENTH AFFIRMATIVE DEFENSE

The Department lacks jurisdiction to hear Fibertech's Amended Complaint.

WHEREFORE, for the reasons set forth above, Mass. Electric respectfully requests that the Department deny all of Fibertech's prayers for relief and dismiss its Amended Complaint.

Respectfully submitted,

MASSACHUSETTS ELECTRIC COMPANY

By its attorneys,

Amy G. Rabinowitz
Judy Y. Lee
25 Research Drive
Westboro, MA 02459

Dated: June 13, 2003

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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)	
FIBER TECHNOLOGIES NETWORKS, LLC,)	
f/k/a FIBER SYSTEMS, LLC,)	
)	
v.)	
)	
VERIZON NEW ENGLAND, f/k/a)	
NEW ENGLAND TELEPHONE AND)	D.T.E. 03-56
TELEGRAPH COMPANY,)	
)	
And)	
)	
NORTHEAST UTILITIES SERVICE COMPANY,)	
d/b/a WESTERN MASSACHUSETTS)	
ELECTRIC COMPANY,)	
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And)	
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MASSACHUSETTS ELECTRIC COMPANY.)	
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MASSACHUSETTS ELECTRIC COMPANY’S MOTION TO DISMISS

Massachusetts Electric Company (“Mass. Electric”) hereby moves to dismiss with prejudice the Amended Complaint and Petition for Declaratory Relief (“Amended Complaint”) of Fiber Technologies Networks, LLC f/k/a Fiber Systems, LLC (“Fibertech”). In support of this motion, and for reasons more fully set forth in the accompanying memorandum of law, Mass. Electric states as follows:

1. Fibertech lacks standing to bring this Amended Complaint. It is not a licensee under 220 CMR 45.02. Therefore, the Department of

Telecommunications and Energy (“Department”) lacks jurisdiction over Fibertech’s allegations.

2. The Department cannot allow Fibertech to collaterally attack the terms and conditions pursuant to which it would have been authorized to attach to Mass. Electric’s poles, when Fibertech has already attached to those poles unlawfully and without authorization.
3. Fibertech’s previous complaint, regarding the identical facts in circumstances, remains pending before the Department in D.T.E. 02-47.
4. Pursuant to 220 CMR 45.04(4), Fibertech has failed to provide the required affidavit in support of its Amended Complaint.

WHEREFORE, Mass. Electric respectfully requests that the Department dismiss Fibertech’s Amended Complaint with prejudice.

MASSACHUSETTS ELECTRIC COMPANY

By its attorneys,

Amy G. Rabinowitz
Judy Y. Lee
25 Research Drive
Westboro, MA 02459

Dated: June 13, 2003

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)	
FIBER TECHNOLOGIES NETWORKS, LLC,)	
f/k/a FIBER SYSTEMS, LLC,)	
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v.)	
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VERIZON NEW ENGLAND, f/k/a)	
NEW ENGLAND TELEPHONE AND)	D.T.E. 03-56
TELEGRAPH COMPANY,)	
)	
And)	
)	
NORTHEAST UTILITIES SERVICE COMPANY,)	
d/b/a WESTERN MASSACHUSETTS)	
ELECTRIC COMPANY,)	
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And)	
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MASSACHUSETTS ELECTRIC COMPANY.)	
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Massachusetts Electric Company (“Mass. Electric”) hereby submits this memorandum of law in support of its Motion to Dismiss with prejudice the Amended Complaint and Petition for Declaratory Relief (“Amended Complaint”) of Fiber Technologies Networks, LLC f/k/a Fiber Systems, LLC (“Fibertech”). For the reasons

set forth below, The Department of Telecommunications and Energy (“Department”) should dismiss Fibertech’s Amended Complaint with prejudice.¹

I. FACTS

The Amended Complaint represents Fibertech’s latest attempt to rationalize and justify *ex post facto* its unlawful actions in installing unauthorized and unlicensed attachments on poles owned by Mass. Electric, Verizon New England, f/k/a New England Telephone and Telegraph Company, d/b/a Verizon Massachusetts (“Verizon MA”), and Northeast Utilities Service Company d/b/a Western Massachusetts Electric Company (“WMECO”) in Western Massachusetts. Fibertech installed these attachments in express violation of various aerial license agreements separately entered into by and between Fibertech and the aforementioned utilities.

On or about March 17, 2000, Mass. Electric entered into an Aerial License Agreement (“Agreement”) with Fibertech, which would allow Mass. Electric to license attachments by Fibertech to poles owned solely or jointly in Worcester. Attachment E, ¶ 3. This Agreement was amended on July 22, 2000, December 13, 2000, and July 3, 2001 to add other municipalities. Attachment E, ¶¶ 4-6. The parties added Northampton pursuant to both the July 22, 2000 and December 13, 2000 amendments. Attachment E, ¶ 5, Attachment J. Between July 2000 and February 2002, Fibertech sent Mass. Electric applications seeking to make attachments to hundreds of poles in Mass. Electric’s western Massachusetts service area, including Northampton. Attachment D, ¶ 7. In connection therewith, Mass. Electric worked closely with Fibertech, advising Fibertech of the necessary

¹ Mass. Electric provides and refers to exhibits in this memorandum of law, although the Department need not consider the facts set forth in these exhibits in order to grant Mass. Electric’s motion to dismiss.

steps for securing these attachments, and providing them with written policies and procedures for attaching. Attachment D, ¶ 7.

From the beginning, Fibertech appeared reluctant to comply with licensing requirements. Attachment D, ¶ 8. Fibertech often disputed and questioned vertical clearance standards set forth by the National Electric Safety Code (“NESC”), which Mass. Electric follows. Attachment D, ¶ 8.

On or around the weekend of June 21, 2002 through June 23, 2002, Fibertech attached fiber cables to poles solely and jointly owned by Mass. Electric, without authorization. Attachment D, ¶ 9. Fibertech never even submitted applications for many of these attachments. Attachment D, ¶ 10. A complete summary of Fibertech’s applications, locations and number of poles involved, status of make-ready work, and confirmed unauthorized Fibertech attachments is provided in Attachment D, ¶ 11. Fibertech made these attachments in complete disregard of the requirements in the Aerial License Agreement. Attachment D, ¶ 12, Attachment E, ¶ 7. The attachments ignored applicable standards of construction, maintenance, and safety. Attachment D, ¶ 12. Fibertech even attached to a number of old condemned poles that Mass. Electric intended to replace because they had deteriorated. Attachment D, ¶¶ 17-18. Fibertech’s haphazard installation of its attachments created countless construction, maintenance, and safety issues, and has also made it extremely difficult for Mass. Electric to complete the make-ready work that would be required to accommodate Fibertech’s attachments. Attachment D, ¶ 21.

Mass. Electric notified Fibertech on July 15, 2002 that it had made these unauthorized attachments, and Fibertech responded on July 22, 2002, denying that it lacked authorization. Attachment E, ¶¶ 7-8. In a follow-up letter dated July 25, 2002, Fibertech

admitted that it did not have authorization, and claimed that it would now pursue such authorization. Attachment E, ¶ 11. Fibertech failed to do so, however, and Mass. Electric gave Fibertech notice of termination by letter dated September 18, 2002. Attachment E, ¶ 12.

Fibertech made these attachments not only without Mass. Electric's consent, but also without the consent of Northampton. Attachment D, ¶ 22, Attachment E ¶ 11.

In August 2002, Verizon MA and WMECO filed suit against Fibertech in the Superior Court of Hampden County for failing to obtain required licenses prior to installing attachments on their poles and making many of the attachments in an unsafe manner that jeopardized the safety of their employees, the employees of other companies who attach to the poles, and the general public. In apparent retaliation to the suits filed against it, on August 13th, 2002, Fibertech filed a Petition for Interim Relief and Complaint ("Petition") against Verizon MA and WMECO. The Department docketed this matter as D.T.E. 02-47. Following a hearing on August 14th, the Superior Court justice entered an order granting Verizon MA and WMECO a preliminary injunction that prohibited Fibertech from making any further attachments without the express written authorization of the pole owner(s), the Superior Court, or the Department, and required Fibertech to remove within 45 days all attachments on poles for which it did not have a license or alternatively, tender \$400,000 to Verizon MA and WMECO to be used by Verizon MA and WMECO to correct unsafe conditions caused by Fibertech's attachments on Verizon MA and WMECO's poles. Fibertech's Petition was dismissed without prejudice by the Department on December 24, 2002. Fibertech requested reconsideration of the Department's dismissal, for which the Department has yet to rule. Thus, the D.T.E. 02-47 proceeding remains pending.

Mass. Electric also filed suit against Fibertech in the Superior Court of Hampden County on September 18th, 2002, requesting injunctive relief and damages for breach of the Agreement. Copies of documents filed in that proceeding are provided in the accompanying Appendix, and are incorporated herein by reference: Attachment A, Complaint of Mass. Electric; Attachment B, Application for Preliminary Injunction; Attachment C, Memorandum of Law in Support of Application for Preliminary Injunction; Attachment D, Affidavit of Pamela Jo Fournier; Attachment E, Affidavit of G. Paul Anundson; and Attachment F, Emergency Motion to Consolidate with the Verizon MA and WMECO proceeding. On September 23rd, 2002, Fibertech filed its motion at the Department to add Mass. Electric to its Petition. Because the Department dismissed Fibertech's Petition against Verizon MA and WMECO, it mooted Fibertech's motion to add Mass. Electric to the Petition. In addition, the Hampden Superior Court denied Fibertech's Motions to Dismiss the complaints of Mass. Electric, Verizon MA, and WMECO on November 14, 2002; May 23, 2003; and May 23, 2003, respectively.

Fibertech agreed to enter into a consent order with Mass. Electric that closely mirrors the terms of the Superior Court order granting the preliminary injunction in favor of Verizon MA and WMECO. In the consent order, dated September 30, 2002, Fibertech agreed not to make any further attachments to Mass. Electric's poles without the express written authorization of the pole owner(s), the Superior Court, or the Department; to pay Mass. Electric \$59,000 for corrections of all unsafe conditions caused by Fibertech's attachments on Mass. Electric's solely owned poles;² and to transfer other attachments as required by Mass. Electric. A copy of the consent order is attached as Attachment G..

² Most of the poles on which Fibertech installed its unauthorized attachments were jointly owned with Verizon MA, and Mass. Electric was to be reimbursed for the make-ready costs on these jointly-owned

On May 14, 2003, Fibertech filed its Amended Complaint, despite the fact that Department has yet to rule on Fibertech's request for reconsideration in D.T.E. 02-47. The Amended Complaint is a thinly disguised attempt to rehash the same false allegations and gross misrepresentations that Fibertech made in the Petition, and once again, Fibertech fails to provide any factual support for the accusations it makes in the Amended Complaint.

II. STANDARD OF REVIEW

The Department's procedural regulations allow motions to dismiss an initial filing. 220 CMR §1.06(6)(e). The Department's current standard for ruling on a motion to dismiss was first articulated in Riverside Steam & Electric Company, D.P.U. 88-123, at 26-27 (1988). More recently, the Department noted:

In determining whether to grant a motion to dismiss, the Department takes the assertions of fact as true and construes them in favor of the non-moving party. [Riverside, D.P.U. 88-123 at 26-27]. Dismissal will be granted by the Department if it appears that the non-moving party would be entitled to no relief under any statement of facts that could be proven in support of its claim. *Id.*

Massachusetts Electric Company, D.T.E. 02-43, at 6 (2002).

poles out of Fibertech's payment to Verizon MA stemming from the Superior Court order granting the preliminary injunction, but as described in the response to paragraph 16 below, Verizon has spent the entire amount of the payment tendered to it by Fibertech to correct violations caused by Fibertech's unauthorized attachments on Verizon MA's poles. Fibertech still has an outstanding obligation to Mass. Electric in the amount of \$14,657 for the make-ready costs described above.

III. ARGUMENT

A. **Fibertech is neither a utility nor a licensee, and therefore has no standing to file its Amended Complaint with the Department.**

Fibertech filed its amended complaint and petition pursuant to the Department's pole attachment regulations. According to 220 CMR 45.02, a complainant under these regulations must be either a licensee or a utility. A licensee is defined as "any person, firm or corporation other than a utility, which is authorized to construct lines or cables upon, along, under and across the public ways." *Id.* A utility is defined as "any person, firm, corporation, or municipal lighting plant that owns or controls or shares ownership or control of poles, ducts, conduits, or rights-of-way. . . for the transmission of intelligence by telegraph, telephone, or for the transmission of electricity." *Id.* Fibertech does not claim to be a utility. Therefore, in order to qualify to bring a complaint pursuant to the pole attachment regulations, Fibertech must show that it is a licensee.

The Department gave further guidance as to what constitutes a licensee in another proceeding involving Fibertech, D.T.E. 01-70.³ In that proceeding, which arose out of a complaint Fibertech filed against Shrewsbury Electric Light Plant, the Department stated that Fibertech qualified as a licensee only if it was in the business of transmission of intelligence. D.T.E. 01-70 at 21. The Department elaborated, holding that a company is in the business of transmission of intelligence only after the board of selectmen in the town where the attachments in question are to be located has granted a location for the line. D.T.E. 01-70 at 22. The Department stated that registration as a common carrier is

³ Mass. Electric requests that the Department take administrative notice of its December 24, 2002 interlocutory order in D.T.E. 01-70.

not sufficient to establish that a company is in the business of transmission of intelligence. D.T.E. 01-70 at 19.

Fibertech claims that it is a “telecommunications provider” and a “common carrier within the meaning of G.L. c. 159 § 12” and therefore is “authorized to construct its lines along, under and across public ways and, as such, it is a ‘licensee’ within the meaning of G.L. c. 166, § 25A, and 220 CMR 45.02.”⁴ Amended Complaint, ¶ 27. These contentions are woefully insufficient to establish that Fibertech is a licensee. Fibertech has not shown that it is in the business of transmission of intelligence. Fibertech has not claimed or shown that it has been granted locations for its attachments. Fibertech merely makes the same arguments that it made in D.T.E. 01-70, which the Department already rejected.

Because Fibertech has not demonstrated that it is a licensee, Fibertech lacks standing to bring this Amended Complaint, and the Department lacks the jurisdiction to hear it. The Department must dismiss this Amended Complaint.

B. The Department cannot allow Fibertech to collaterally attack the terms and conditions pursuant to which it would have been authorized to attach to Mass. Electric’s poles, when Fibertech has already attached to those poles unlawfully and without authorization.

The Department must dismiss Fibertech’s Amended Complaint and cut off Fibertech’s transparent attempt to avoid its contractual obligations and nullify its illegal actions of engaging in self-help by attaching its equipment to Mass. Electric’s poles under cover of darkness, without authorization and in an unsafe way. To allow Fibertech to proceed would reward Fibertech for its several violations of law and contract.

⁴ M.G.L. c. 159, § 12 states that the Department shall supervise and regulate common carriers.

Mass. Electric and Fibertech entered into a pole attachment agreement on or about March 17, 2000. Attachment E, Exhibit A; and Exhibit E to Fibertech Amended Complaint. This pole attachment agreement did not cover Northampton, and the parties executed an addendum on July 22, 2000 that added Northampton to the scope of the Agreement. Attachment J. This agreement contains a dispute resolution procedure, which allows for resolution on an informal basis by senior representatives of the parties, followed by non-binding arbitration if the parties agree to it, and otherwise resolution by the regulatory agency or court of appropriate jurisdiction. Id. at § 20. If Fibertech had a legitimate complaint regarding Mass. Electric's actions, it should have availed itself to this dispute resolution procedure. Fibertech did none of these, however, even though it claims in Paragraph 34 of its Amended Complaint that Mass. Electric took up to 325 days to respond to some of its applications.

Instead, Fibertech illegally attached to Mass. Electric's poles prior to receiving a license from Mass. Electric. Fibertech's rationale for taking its actions has been totally discredited by the Hampton Superior Court decision in the Verizon MA and WMECO cases, based on the same set of facts as the Mass. Electric one.⁵ Attachment C. Indeed, following the court decision, Fibertech entered into the consent order with substantially the same terms with Mass. Electric. Attachment G.

⁵ See Attachment C, court order, page 8. The court found that "Fibertech deliberately resorted to self-help, before instituting proceedings at the DTE and before advising Plaintiffs of its claims to licenses and its intention to make attachments, in order to present Plaintiffs and the DTE or a court of law with a fait accompli; thereby appropriating to itself all the benefits of a license and positioning itself to argue that a removal order would substantially harm Fibertech and subject it to undue and wasteful costs. Having unjustifiably and, in this Court's view, unlawfully created the likelihood of precisely the injunctive relief which it now contends will irreparably harm it and offering no compelling reason why court or DTE approval could not have been sought before erecting the attachments, Fibertech is in no position to argue that any harm it might suffer from preliminary relief outweighs the harm to Plaintiffs which would result from permitting the attachments to remain in place."

Allowing Fibertech to go forward now will reward Fibertech for taking its unjustified and unauthorized actions, without having first notified Mass. Electric of its claim to licenses or its intention to attach, and without taking advantage of proper and available dispute resolution procedures available to it under its agreement with Mass. Electric. The Department must not allow Fibertech to challenge the terms and conditions of attachment in the Aerial License Agreement after Fibertech has availed itself of attachments to Mass. Electric's poles without authorization, unsafely and in violation of that agreement. To do so would encourage other similarly situated entities to also take the law into their own hands and attach to poles, whether safely or unsafely, without authorization and in violation of governing statutes and then raise as a defense to any subsequent legal action by pole owners an argument that the terms and conditions of any pole attachment are unjust, unreasonable or discriminatory. This is contrary to public policy which favors maintenance of lawful, orderly and safe attachments to utility facilities. The Department must not encourage this type of unlawful, irresponsible and potentially dangerous self-help.

C. Fibertech still has a motion for reconsideration pending in D.T.E. 02-47

Fibertech still has a motion for reconsideration pending in D.T.E. 02-47 regarding the identical facts and circumstances. On August 13, 2002, Fibertech filed its complaint in D.T.E. 02-47 against WMECO and Verizon MA, and on September 23, 2002 moved to add Mass. Electric as a party. On December 24, 2002, the Department issued an Order dismissing that complaint without prejudice. On January 15, 2003, Fibertech filed a Motion for Reconsideration and Clarification and in addition, requested an extension of

the time in which it could file an appeal. The Department has not yet ruled on Fibertech's motion.

Because Fibertech's initial complaint is still before the Department, it is premature for the Department to consider Fibertech's Amended Complaint. It makes no sense to have two open dockets regarding the identical facts and claims, and is also contrary to the efficient use of resources for both the Department and the parties. Mass. Electric is not aware of a precedent by which a party can file a complaint regarding the same claims as another complaint already before the Department.

D. Fibertech has not complied with the filing requirements of 220 CMR 45.04(4) because it has not filed an affidavit supporting its factual allegations.

The Department's pole attachment regulations, 220 CMR 45.04, govern the elements to be included in any complaint filed with the Department. The regulations state that a complaint must include an affidavit to support "all factual allegations set forth in the complaint." 220 CMR 45.04(4). Fibertech did not file such an affidavit, however. Therefore, its Amended Complaint must be dismissed. Mass. Electric notes that should Fibertech attempt at this time to remedy this problem by filing an affidavit, it will be similar to its practice regarding pole attachments: ignore the law and regulations, and then try to justify their conduct later. In addition, as WMECO notes in its memorandum of law in support of its motion to dismiss, given Fibertech's manipulation of the facts, it is particularly important to note that no one at Fibertech seems willing to swear to the factual allegations made and be responsible should they not prove to be truthful.

IV. CONCLUSION

Based on the foregoing, Mass. Electric respectfully requests that its motion to dismiss with prejudice be granted.

MASSACHUSETTS ELECTRIC COMPANY

By its attorneys,

Amy G. Rabinowitz
Judy Y. Lee
25 Research Drive
Westboro, MA 02459

Dated: June 13, 2003

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY

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FIBER TECHNOLOGIES NETWORKS, LLC,)
f/k/a FIBER SYSTEMS, LLC,)
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v.)
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NEW ENGLAND TELEPHONE AND)
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)
)

D.T.E. 03-56

And)
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NORTHEAST UTILITIES SERVICE COMPANY,)
d/b/a WESTERN MASSACHUSETTS)
ELECTRIC COMPANY,)
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MASSACHUSETTS ELECTRIC COMPANY.)
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**MASSACHUSETTS ELECTRIC COMPANY’S MOTION TO STAY THE
PROCEEDINGS PENDING RESOLUTION OF THE MOTIONS TO DISMISS**

Massachusetts Electric Company (“Mass. Electric”) respectfully requests that the Department of Telecommunications and Energy stay the procedural schedule in this proceeding pending resolution of the respondents’ motions to dismiss filed in this proceeding.

As grounds for this motion, Mass. Electric states that it is in the interest of administrative efficiency. The motions to dismiss, if granted by the Department, will

resolve all issues in this proceeding. If the proceedings are not stayed, the parties will have to spend substantial efforts on discovery, the hearing, and briefs.

WHEREFORE, for the reasons set forth above, Mass. Electric respectfully requests that the Department stay the procedural schedule pending resolution of the respondents' motion to dismiss.

Respectfully submitted,

MASSACHUSETTS ELECTRIC COMPANY

By its attorneys,

Amy G. Rabinowitz
Judy Y. Lee
25 Research Drive
Westboro, MA 02459

Dated: June 13, 2003

FIBER TECHNOLOGIES NETWORKS, LLC,
f/k/a FIBER SYSTEMS, LLC,

v.

VERIZON NEW ENGLAND, f/k/a
NEW ENGLAND TELEPHONE AND
TELEGRAPH COMPANY,

And

NORTHEAST UTILITIES SERVICE COMPANY,
d/b/a WESTERN MASSACHUSETTS
ELECTRIC COMPANY,

And

MASSACHUSETTS ELECTRIC COMPANY.

I hereby certify that I served copies of Massachusetts Electric Company's Answer, Motion to Dismiss, Memorandum of Law in Support of Motion to Dismiss, Motion to Stay the Proceedings Pending Resolution of the Motions to Dismiss, and Attachments in D.T.E. 03-56 by overnight courier and first-class mail to:

Stephen Gibelli, Esq.
NORTHEAST UTILITIES
SERVICE COMPANY
107 Selden Street
Berlin, CT 06037

Stephen Klionsky, Esq.
NORTHEAST UTILITIES
SERVICE COMPANY
101 Federal Street, 13th Floor
Boston, MA 02110

Matthew E. Mitchell, Esq.
KEEGAN, WERLIN & PABIAN
21 Custom House Street
Boston, MA 02110-3525

Charles B. Stockdale, Esq.
Robert T. Witthauer, Esq.
FIBERTECH NETWORKS
140 Allens Creek Road
Rochester, NY 14618

Cameron F. Kerry
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY AND POPEO, P.C,
One Financial Center
Boston, MA 02111

Amy G. Rabinowitz
25 Research Drive
Westboro, MA 01582

Dated: June 13, 2003